Filed 4/20/12 Marriage of Wackerbarth CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of RICHARD S. and PATRICIA A. WACKERBARTH.	
RICHARD S. WACKERBARTH, Appellant, v. PATRICIA A. WACKERBARTH, Respondent.	G045408 (Super. Ct. No. 08D004481) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Walter D. Posey, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Offices of Brian G. Saylin and Brian G. Saylin for Appellant.

Parsons & Pietro and Shannon M. Pietro for Respondent.

* * *

Richard S. Wackerbarth appeals from the trial court's order denying his motion to terminate his spousal support obligation to Patricia A. Wackerbarth. We

conclude the trial court correctly interpreted the couple's final dissolution judgment, containing the parties' express stipulation spousal support would not terminate until 2015 (except for limited circumstances not present in this case). We affirm the order.

I

Richard and Patricia[1] were married on May 20, 1994, and separated nearly 14 years later on April 24, 2008. They have no children. During the marriage they were both employed by Deloitte. They lived an affluent lifestyle.

In December 2008, the trial court considered Patricia's request for temporary spousal support, attorney fees, and accountant fees. In October 2008, Patricia had lost her job and she was still unemployed.

In February 2009, the court determined Richard earned $68,000 per month plus half the rental income he received from real property ($2,650). The court concluded Patricia earned approximately $8,700 per month plus her half of the rental income from the real property. The court determined Richard had expenses related to his residence of $5,416 plus $416 in property taxes and $5,000 in interest. Richard also paid $3,816 per month for a mandatory retirement account and $380 per month for health insurance premiums. Using the DissoMaster, the court calculated the guideline spousal support to be $21,477. However, the trial court stated it deviated from the DissoMaster and ordered Richard to pay Patricia $10,000 per month. The order does not indicate the court's reasons.

After several months of negotiations, that included a vocational assessment to determine Patricia's earning ability, the parties reached a settlement agreement regarding spousal support. On September 2, 2009, after a trial on other issues, the court

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[1] We refer to the parties by their first names for ease of reading and to avoid confusion, not out of disrespect. (*In re Marriage of James M.C. and Christine J.C.* (2008) 158 Cal.App.4th 1261, 1264, fn. 1.)

entered a final judgment of marital dissolution. The court determined Richard was employed and had a monthly income of $35,147. It recognized Patricia was newly employed as a real estate salesperson, but she currently had no income. The couple's total community property estate equaled $4,654,958. Richard was awarded one half ($2,859,771), and Patricia was awarded $1,795,187. Richard was ordered to make an equalization payment to Patricia in the amount of $456,633.

The court included in the final judgment the parties' stipulation regarding spousal support: The parties agreed Richard would pay spousal support to Patricia on the following step-down basis over a period of six years:

"a. The sum of $7,000.00 per month, payable on the 7th day of each month, from July 1, 2009, through June 20, 2010;

"b. The sum of $6,000.00 per month, payable on the 7th day of each month, from July 1, 2010, through June 30, 2011;

"c. The sum of $5,500.00 per month, payable on the 7th day of each month, from July 1, 2011, through June 30, 2012;

"d. The sum of $5,000.00 per month, payable on the 7th day of each month, from July 1, 2012, through June 30, 2013;

"e. The sum of $4,500.00 per month, payable on the 7th day of each month, from July 1, 2013, through June 30, 2014; and

"f. The sum of $4,000.00 per month payable on the 7th day of each month, from July 1, 2014, through June 30, 2015, at which time jurisdiction over spousal support shall terminate forever." The judgment specified, "The above-referenced spousal support shall terminate upon the death of either party, remarriage of [Patricia], or further order of [the c]ourt, whichever first occurs. [¶] . . . Such spousal support meets [Patricia's] needs."

In addition, the judgment contained a paragraph entitled, "Termination Date for Spousal Support." It stated, "The parties have carefully bargained relative to all

issues relating to spousal support, including the amount of spousal support, its duration, and whether or not it should be extendable. The termination date concerning spousal support specified herein, is absolute, notwithstanding any future change in the law or unforeseen financial or health-related circumstances. Neither equitable estoppel nor any facts constituting estoppel shall be the basis for a change to this order. The provisions herein are not ambiguous and no parol evidence shall be admitted to interpret the support provisions. The right to ask for support payments beyond that date is cut off forever, as is the power of any [c]ourt to order support payments, and the right to receive support payments. No [c]ourt has jurisdiction to extend or order any payments (expect arrearages) beyond said termination date regardless of whether an extension of support is petitioned for before or after said date. Counsel has advised both parties that this clause may work great and unexpected hardship on either or both parties and both parties have considered that possibility in electing to fix a specific date after which there shall remain no spousal support obligation."

Relevant to this case, the judgment also contained the following *Gavron*[2] notice: "Notwithstanding the amount and term of spousal support awarded herein, and regardless of the length of the marriage, [w]ife is hereby put on notice that there is a goal that she shall become self-supporting within a reasonable period of time. A 'reasonable period of time' shall be defined as one-half the period from the date of marriage to the date of separation. [w]ife is put on further notice that [h]usband may seek to have spousal support terminated if Wife does not reach the goal of becoming self-supporting within a reasonable period of time. The failure to make reasonable, good faith efforts to become self-supporting may be one of the factors considered by the [c]ourt as a basis for modifying or terminating support." According to this definition, a "reasonable period of time" to become self supporting was a little less than seven years (one-half the length of

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[2] *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705.

the marriage). The parties step-down spousal support schedule called for payments for only six years.

Approximately eight months later, on April 30, 2010, Richard moved to terminate his spousal support obligation to Patricia. Richard alleged there had been a "material change in circumstances since the judgment" warranting modification of spousal support to $0 per month. He alleged Patricia was hired as a national recruiter for Deloitte and was again earning $7,000 per month in addition to her income as a real estate agent. He stated Patricia's income now met her needs because she also received rental income of $5,000 per month. Richard asserted his income had decreased from $35,147 per month to $20,500 per month.

Patricia filed an order to show cause (OSC) requesting re-appointment of a forensic accountant to prepare a cash flow analysis of Richard's earnings in relation to his request for spousal support modification. Patricia stated the step-down support order was agreed upon after "months of negotiation" that included "substantial document review and a vocational assessment." Richard was aware she had become employed as a real estate agent, and they "stipulated to an amount of support that would take into consideration [her] anticipated earnings." She maintained Richard's earnings had not decreased but rather increased since the time of the judgment from $35,147 to $45,000 per month. Accordingly, she requested the court re-appoint Glen Mehner to prepare a cash flow analysis of Richard's income from employment. She also requested the court order Richard pay her attorney fees in the amount of $10,000.

Richard opposed Patricia's request for attorney fees. He also filed a motion in limine for "an order excluding any and all evidence of the circumstances of the martial living standard of the parties in this action" on the grounds the judgment "clearly and fully disposed of the issue."

On September 8, 2010, the court denied Richard's motion in limine. The court read into the record the portion of the September 2009 final judgment stating the

court lacked authority to change the termination date for spousal support. It concluded this provision conflicted with the paragraph in the judgment stating the court could modify or terminate spousal support if Patricia failed to find employment within a reasonable time. The court noted that looking at the agreement from the "four corners of the judgment," Richard bargained for spousal support that would be reduced for a number of years until terminating jurisdiction despite having a long term marriage. It concluded Richard essentially "negotiated the waiver of spousal support" and he "should not have it both ways. [He] bargained for an amount. [He] set it in place, and it will terminate [in] 2015. . . . I don't think it should be modified." The court further explained, "I don't think it has anything to do with her earning more. If [Patricia] wins the lottery, hurray for her. If [Richard] wins the lottery, hurray for him. I don't think that she has the right to come back to court and ask him to pay more. You want it to go one way."

The court's minute order stated the court "must consider the lifestyle of the parties, if the spousal support is modifiable. However[,] the [c]ourt finds that the parties did negotiate the terms and conditions in the [j]udgment, that spousal support cannot be extended. Therefore, the [c]ourt finds that the [j]udgment is specific as to its terms and conditions that spousal support is nonmodifiable at this time."

II

The parties agree there is only one question of law raised on appeal: Was the spousal support modifiable? For purposes of this appeal, we will treat the agreement as a settlement agreement, despite the fact the trial court adopted the agreement as its own order. Interpretation of a settlement agreement is governed by the same principles applicable to any other contract, and, in the absence of relevant and conflicting parol evidence, we independently construe the agreement as a matter of law. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166.) The trial court's order is presumed to be correct, and it is appellant's burden to affirmatively show error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

A. General Legal Principles Regarding Spousal Support

Generally, "Spousal support awards and agreements, temporary as well as 'permanent,' are modifiable throughout the support period . . . except as otherwise provided by agreement of the parties. ([Fam. Code,] §§ 3603, 3651, subd. (c)(1), 4333.)"[3] (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2011) ¶ 17:90, pp. 17-32.3 to 17-32.4, italics omitted.) "Unlike child support jurisdiction, spousal support jurisdiction does not necessarily continue postjudgment and may be divested by the terms of the order. Unless jurisdiction to award spousal support has been either expressly reserved by the order or impliedly reserved . . . postjudgment spousal support is limited by the stated duration of the order. [Citations.]" (*Id.* at ¶ 17:91, p. 17-32.4, italics omitted.)

There is an implied statutory retention of jurisdiction in cases where there has been a lengthy marriage. "In marriages of 'long duration' (presumptively 10 years or longer), the court is deemed to retain spousal support jurisdiction 'indefinitely' (notwithstanding the absence of an express reservation of jurisdiction) absent written agreement of the parties to the contrary or a court order terminating spousal support. [Citations.]" (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 17:92, pp. 17-32.4 to 17-32.5, italics omitted.) "Even so, a retention of spousal support jurisdiction after a 'lengthy' marriage does not limit the court's discretion to terminate spousal support in later proceedings on a showing of changed circumstances. [(§ 4336, subd. (c).)] [¶] Indeed, the policy of the law is that spousal support orders be made in a manner that encourages the supported party to become self-supporting within a 'reasonable period of time'; and the failure to make good faith efforts toward self-support may be a factor considered by the court as a basis for modifying or terminating support. [(§§ 4320, subd. (l) ('reasonable period of time' to become self-supporting generally is

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[3] All further statutory references are to the Family Code, unless otherwise indicated.

deemed to be one-half the length of the marriage), 4330, subd. (b).)] [Citations.] [¶] Thus, where the supported party is capable of self-support in accordance with the marital standard of living, an indefinite-term order will rarely be appropriate. [Citations.]" (Hogoboom & King, Cal. Practice Guide: Family Law, *supra,* ¶ 17:93, p. 17-32.5, italics omitted.)

Relevant to this case, section 3651, subdivision (a), provides "a support order may be modified or terminated at any time as the court determines to be necessary." The exception to this rule is contained in section 3651, subdivision (d), which explains, "An order for spousal support may not be *modified or terminated* to the extent that a written agreement, or, if there is no written agreement, an oral agreement entered into in open court between the parties, specifically provides that the spousal support is not subject to modification or termination." (Italics added.) Similarly, section 3591, subdivision (c), provides, "An agreement for spousal support may not be *modified or revoked* to the extent that a written agreement, or, if there is no written agreement, an oral agreement entered into in open court between the parties, specifically provides that the spousal support is not subject to modification or termination." (Italics added.)

Courts have interpreted the above exception to require explicit language prohibiting judicial modification or termination. For example, one court held a general "release of rights" does not disclose a specific intent against judicial modification in the face of changed circumstances. (*In re Marriage of Nielsen* (1980) 100 Cal.App.3d 874, 878 (*Nielsen*).) In *Fukuzaki v. Superior Court* (1981) 120 Cal.App.3d 454, 458, the court held, "The provisions for a 'final and complete' settlement coupled with a release of all obligations and a provision that the agreement is entire and binding on the parties and their heirs do not equate with the requirement of a 'specific' provision for nonmodification such as 'nonmodifiable' [citation], or 'irrevocable' [citation]. Although no particular magic words are needed to provide the exception to nonmodifiability

contemplated by [section 3591, formally section 4811, subdivision (b)], some specific unequivocal language directly on the question of modification is required."

On the other hand, in *Forgy v. Forgy* (1976) 63 Cal.App.3d 767, 770, the court held unmodifiable a pre-divorce separation agreement stating it should be incorporated in any subsequent divorce, but that "'such decree shall in no way affect this [a]greement or any of the terms, covenants, or conditions thereof, it being understood that this [a]greement is absolute, unconditional and irrevocable.'" Similarly, the court in *Nielsen, supra,* 100 Cal.App.3d at page 878, concluded an agreement which provided that it should "'not depend for its effectiveness on (court) approval, nor be affected thereby,'" was a specific provision precluding judicial modification. (See also *In re Marriage of Bennett* (1983) 144 Cal.App.3d 1022, 1024 [husband could not terminate support when agreement stated the obligation "shall be nonmodifiable and . . . no [c]ourt shall have jurisdiction to modify said sum in any way . . . ."].)

We find instructive, *In re Marriage of Jones* (1990) 222 Cal.App.3d 505, 509, where the trial court reviewed a spousal support agreement, incorporated into the final judgment, that provided for specific payments for identified time periods, and also provided the payments would terminate on death, remarriage, or a specific date. The court held a support step down with fixed termination date was not a "specific provision" precluding judicial modification or extension of support. The court in *Jones* reasoned, "[T]he agreement contained no articulated reference to either a power of court modification or preclusion of court modification." (*Ibid.*) The court recognized a spousal support step down with a fixed termination date "suggest[s] . . . contemplation of finality and nonmodifiability." However, it concluded the Legislature, "In an effort to improve what had become a very unclear area of law and practice . . . established the principle of continuing jurisdiction to modify spousal support decrees, preserving the parties' power to exclude such jurisdiction only if they were to 'specifically provide[] to the contrary' in their marital agreement. [Citation.] One can speculate as to the

intentions of the [husband and wife] with their adoption of a precisely declining schedule of support. It is possible, or perhaps even likely, that at least [h]usband assumed his agreement was final and nonmodifiable. He did not, however, comply with the then-effective requirement for achieving this result: that his intention be *specifically* set forth. We conclude the trial court was justified in finding jurisdiction to change the amount of current support." (*Id.* at p. 511.)

"Once the spousal support period expires in accordance with a clear and unequivocal termination date or terminating event, the court has no jurisdiction to extend further support unless it retained jurisdiction (expressly or impliedly under [section] 4336 . . .) in its most recent order. [Citations.]" (Hogoboom & King, Cal. Practice Guide: Family Law, *supra,* ¶ 17:107, p. 17-32.10, italics omitted.) "There is no jurisdiction to extend support beyond a stipulated termination date where the termination clause clearly and unequivocally evidences the parties' intent to foreclose any judicial modification. E.g., an order stating 'In no event shall (husband) be obligated to pay spousal support to (wife) after (specified termination date)' is 'explicit language of termination' constituting a 'specific provision concerning judicial modification' that effectively precludes any court extension of the support obligation. [Citations.]" (Hogoboom & King, Cal. Practice Guide: Family Law, *supra,* ¶ 17:109, p. 17-32.12, italics omitted.)

And finally, we note that, "In the event the controlling terms are in conflict—i.e., a general provision precluding future judicial modification and a more specific provision that effectively retains spousal support jurisdiction—*the specific provision prevails*; and the trial court has jurisdiction to modify spousal support. [Citation.]" (Hogoboom & King, Cal. Practice Guide: Family Law, *supra,* ¶ 17:129, p. 17-32.17.)

B. The Agreement

We conclude the spousal support agreement in this case contains multiple conflicting provisions. We begin our analysis by taking apart the terms line by line to

demonstrate the problem the trial court faced in interpreting the spousal support agreement.

The first paragraph of the spousal support agreement delineates a detailed support step-down obligation, having a fixed termination date of June 30, 2015, "at which time jurisdiction over spousal support shall terminate forever." As discussed in the *Jones* case, a spousal support step down does not itself qualify as a specific provision precluding judicial modification or termination. (*Jones, supra,* 222 Cal.App.3d at p. 511.) However, the final statement that on June 30, 2015, "jurisdiction over spousal support shall terminate forever" clearly signifies the termination date was nonmodifiable.

Conversely, the statement leaves open the possibility of judicial modification or termination before June 30, 2015. The next sentence of the judgment plainly supports this conclusion by providing that in addition to the absolute June 30th termination date, spousal support "shall terminate upon the death of either party, remarriage of [Patricia] or further order of [the c]ourt, whichever first occurs." We conclude this first portion of the agreement clearly provided the court retained jurisdiction to *modify and terminate* support before June 30, 2015, and lost jurisdiction thereafter (this section hereafter referred to as "the first portion of the agreement").

The next paragraph, titled "Termination Date for Spousal Support," significantly confuses the issue of jurisdiction. Although the title refers only to the termination date, the entire paragraph makes several references to the court's jurisdiction to modify the amount of support. It also contains language that would prohibit the court from terminating support any time *before* the fixed date of June 30, 2015. It is much more specifically worded than the first portion of the agreement conferring general jurisdiction to the trial court to modify or terminate support any time before the fixed date.

For example, the paragraph starts by stating the parties "bargained relative to all issues relating to spousal support, including the amount of spousal support, its

duration, and whether or not it should be extendable" (hereafter "the preamble"). The preamble's reference to "all issues" including "the amount" reflects the parties' agreement related to more than fixing a support termination date. In short, the parties bargained for a particular amount in addition to a specific duration for support. The preamble, however, does not address the question of whether the court retained jurisdiction to change the agreed upon amount or duration.

The second sentence of the paragraph states the termination date is "absolute" but also qualifies the term "absolute" to authorize changes to the date based on "any future change in the law or unforeseen financial or health related circumstances" (hereafter referred to as the unforeseen circumstances clause). This qualifying language authorizes the trial court to retain jurisdiction and reconsider whether the fixed termination date should be shorted or extended, but only if one of three limited circumstances should unexpectantly arise. For example, if one of the parties were to be diagnosed with terminal cancer, the parties agreed the trial court had jurisdiction to consider whether the support termination date should be extended or shortened. This statement directly conflicts with the earlier unconditional sentence clearly stating the court's jurisdiction would absolutely expire on June 30, 2015, at the latest.

The next section of the paragraph listed three claims that could not serve as a basis for a "change to this order." Because "this order" reflects both the amount and a termination date, the restraint on the court's jurisdiction would apply to both modification of the amount and the termination date. The parties agreed changes to the "support provisions" could not be based on claims of: (1) equitable estoppel; (2) "facts constituting estoppel"; or (3) allegations the "support provisions" are ambiguous (hereafter the claim preclusion provision). We recognize such a specific listing leaves the door open for changes to the support provision based on other types of claims, such as a change in financial circumstances. Consequently, this statement can be construed as a specific provision prohibiting the court from modifying the amount and termination date

in a few limited circumstances. In short, the court retained its jurisdiction to modify the amount or the fixed end date for reasons other than estoppel or ambiguity.

In contrast, the next two sentences are very specific provisions precluding judicial modification of the fixed termination date. The first quite lengthy sentence provides the right to "ask for support" and "receive support" is "cut off forever" after the termination date. In addition, it specifies the "power of any [c]ourt" to order support is "cut off forever" after the termination date. The second sentence generally states, "[n]o court has jurisdiction to extend or order any payments (except arrearages)," regardless of whether a petition is filed before or after the termination date of June 30. These statements are specific provisions specifying support payments absolutely terminate on June 30. However, they do not preclude the court from *modifying* support before June 30, 2015.

The final sentence of the "termination date" paragraph is perhaps the most telling as to what the parties bargained for. It recites that attorneys advised both parties the fixed termination date may "work great and unexpected hardship on either or both parties" and both parties "have considered that possibility in electing to fix a specific date after which there shall remain no spousal support obligation[]" (hereafter referred to as the hardship provision). This statement confirms the parties' intent that support is nonterminable before the fixed date of June 30, 2015, and all support ceases after June 30, 2015.

For Patricia, the obvious hardship caused by the fixed date is that she would be financially destitute if she did not secure another source of income by June 30, 2015. For Richard, the foreseeable hardship is his continued obligation to pay support until the fixed date regardless of dips in his income. There would be no hardship for either party in the event of unforeseen financial or health-related circumstances because, as discussed above, the parties agreed the court retained jurisdiction to modify support in those limited circumstances (the unforeseen circumstances provision).

Looking at the entire agreement, and recognizing that when the controlling terms are in conflict the more specific provision prevails, we conclude the court correctly refused to terminate spousal support before the fixed date. As for the issue of modifying the amount of support, we agree with Richard's claim the trial court retained jurisdiction to *modify* the amount of support, anytime before June 30, 2015, except when the basis for modification is claims of estoppel or ambiguity. However, the court lacked authority to modify the amount of support after June 30, 2015.

Our interpretation of the judgment as permitting limited modification does not assist Richard in this appeal because he sought termination, not modification of support. The court properly recognized Richard's request to modify his support obligation to zero dollars was the same thing as requesting termination. The court correctly interpreted the agreement as giving Patricia the right to collect support on a step-down basis for a limited term of six years. Richard's obligation to pay would not expire until the fixed date, unless one of the limited exceptions applied. Those exceptions were triggered by (1) death, (2) remarriage, or (3) one of the items listed in the unforeseen circumstances clause, and none of them were applicable in this case. We conclude the agreement expressly precluded the court from terminating support before the fixed date.

We note the generic *Gavron* notice in the judgment does not change our conclusion. It stated the court had jurisdiction to "modify or terminate" spousal support *only if* Patricia failed to make a good faith effort to become self-supported within a "reasonable time." A "reasonable time" was defined as being one-half the length of the couple's 14 year marriage (approximately seven years). Thus, this general provision permitted the court to terminate spousal support in 2016, one year after the fixed date set by the parties (June 30, 2015). As discussed above, the more specific provision requiring termination on June 30, 2015, controls.

We also find significant that the *Gavron* notice begins by stating, "Notwithstanding the amount and term of spousal support awarded herein" Patricia was expected to find work and the court could modify or terminate support if she failed by 2016 to become self supporting. This language does not support Richard's claim that if Patricia found work in "good faith," the court must terminate support at an earlier date. To the contrary, it supports the interpretation the parties anticipated Patricia would find another source of income and she willingly waived the potential for a longer period of spousal support. The parties struck a bargain for a step-down support schedule with a fixed expiration date. Richard apparently is experiencing a case of buyer's remorse.

In Richard's reply brief, he argues there is case authority noting the terms modification and termination are not interchangeable. He asserts a nontermination clause would not preclude modification. After reviewing the relevant case law, we conclude the terms modification and termination have different meanings, but depending on the circumstances, they can be interchangeable because "'modification' is the broader term and encompasses the term 'termination.'" (*In re Marriage of Harris* (1976) 65 Cal.App.3d 143, 152 (*Harris*).)

Richard relies on *In re Marriage of Benjamins* (1994) 26 Cal.App.4th 423, 433 (*Benjamins*)), which held, "Termination and modification are distinct concepts describing different ways to alter support obligations." In that case, husband sought to terminate his obligation to pay wife's medical insurance premiums after her death. The wife's daughter opposed the motion based on the marital settlement agreement's nonmodification clause. The court held the husband's spousal support obligations *terminated* by operation of law. (§ 4337.) It reasoned, "[W]e are aware of authority which could be construed as blurring the distinction between modification, revocation and termination of spousal support by treating the terms interchangeably. ([*Harris. supra,*] 65 Cal.App.3d [at p.] 152 [termination nothing more than modification to zero]; *In re Marriage of Bennett* (1983) 144 Cal.App.3d 1022, 1026 [same] (*Bennett*).)

However we believe doing so interjects unnecessary ambiguity and confusion into an area of law already fraught with problems. [¶] Moreover, the Legislature has indicated an intent to treat modification and termination of spousal support separately. Each is governed by different statutes and the purpose and outcome of each statutory objective is vastly different. (Civ. Code, § 4801, subd. (b) [now Fam. Code, § 4337]; Civ. Code, § 4811, subd. (b) [now Fam. Code, §§ 3590, 3591]; see also *In re Marriage of Glasser* (1986) 181 Cal.App.3d 149, 152 (*Glasser*) ['To say that a termination due to [death] is nothing more than a modification flies in the face of the clear legislative intent : . .'].) We consequently reject an interpretation of 'modification' which would make it synonymous with 'termination.' We believe such an interpretation would be in conflict with the controlling statutes and contrary to good policy. [¶] In sum, [husband's] obligation to pay [wife's] medical insurance premiums terminated by operation of law upon her death." (*Benjamins, supra,* 26 Cal.App.4th at p. 433.)

We also found cases holding an agreement's nonmodification clause will not preclude the court from terminating spousal support as required by law if the spouse remarries or dies. (See *Glasser, supra,* 181 Cal.App.3d at p. 152 [remarried wife cannot seek to continue support by broadly defining "nonmodification" clause].) The court reasoned, "To say that a termination due to remarriage is nothing more than a modification flies in the face of the clear legislative intent: Termination of support due to remarriage is governed by section 4801, subdivision (b); modification of support is governed by section 4811, subdivision (b)." (*Glasser, supra,* 181 Cal.App.3d at p. 152.)

The same does not apply in the opposite situation where one spouse is seeking termination of support by "modification" of the support payment to zero dollars. In those cases, the terms modification, termination, and revocation can be used interchangeably. For example, in *Harris, supra,* 65 Cal.App.3d 143, the former husband moved to terminate spousal support provided for in an agreement that was nonmodifiable. The court ruled, "In the circumstances of this case, we reject this

argument. We recognize, of course, that the word 'termination' is susceptible to a different meaning than the word 'modification.' However, 'modification' is the broader term and encompasses the term 'termination.' In the context of the case at bench 'termination' is nothing more than a 'modification' to zero." (*Id.* at p. 152.)

In *Bennett, supra,* 144 Cal.App.3d 1022, the parties had a nonmodifiable spousal support agreement specifying support would terminate only upon either parties' death or wife's remarriage. Husband asked the court to revoke rather than terminate his spousal support obligation. The court concluded, "We realize that, in practical terms, revocation, termination, and modification are frequently used interchangeably. (The provisions of a marital agreement designated "irrevocable" were held to be "nonmodifiable" in *In re Marriage of Kilkenny* (1979) 96 Cal.App.3d 617, 619, and *Forgy v. Forgy* (1976) 63 Cal.App.3d 767, 771.) At the same time, we understand, as did the *Harris* court, that each of these words has a different meaning. [¶] However, the ultimate relief sought by former husband is exactly the same as was sought in *Harris* whatever label is used, namely, an end to his obligation to support his former wife. We are persuaded by the reasoning of the *Harris* court and find that former husband is precluded by his agreement from seeking revocation, termination, or modification of his obligation for spousal support." (*Bennett, supra,* 144 Cal.App.3d at p. 1026.)

The husbands in *Harris* and *Bennett* sought to end their support obligations involving nonmodifiable agreements by asserting narrow definitions of the terms modification and termination. The same rational applies to this case, involving an agreement prohibiting early termination of support (except in limited circumstances not applicable at this time). Richard correctly asserts language making the obligation "nonterminable" before July 2015 will not itself preclude a modification because the two terms are not synonymous. (See Hogoboom & King, Cal. Practice Guide: Family Law, *supra,* ¶ 17:105.1, p. 17-32.10.) We agree the court retained limited jurisdiction to modify the support obligation. But seeking "modification" to $0 achieves the same result

as termination ($0 support). We will not ascribe such a narrow definition to the terms. As noted in *Harris*, "modification" is the broader terms and encompasses the term "termination" in the event support is modified downward to $0. (*Harris, supra,* 65 Cal.App.3d at p. 152.)

Richard did not seek modification of less than the full amount he was obligated to pay. Consequently, we need not address the issue of whether spousal support should have been modified downwards or upwards. However, we note the court correctly recognized it must consider the lifestyle of the parties during their lengthy marriage and any change of circumstances before modifying support. As stated above, the agreement prohibits modification only based on allegations of equitable estoppels or ambiguity. The parties did not *expressly* prohibit judicial modification for other legal grounds. (§ 3651, subd. (d).) And contrary to Richard's theory, the power to modify encompasses more than a reduction of support. The court retained authority to reduce *or increase* support any time before June 30, 2015.

III

The postjudgment order is affirmed. Respondent shall recover her costs on appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

ARONSON, J.